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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. 265

FEDERAL POWER COMMISSION AND ILLINOIS COMMERCE COMMISSION,

Petitioners,

vs.

NATURAL GAS PIPELINE COMPANY OF AMERICA AND TEXOMA NATURAL GAS COMPANY,

Respondents.

ON PETITION FOR CERTIORARI.

BRIEF FOR RESPONDENTS.

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BRIEF FOR RESPONDENTS.

In the cross-petition (Docket No. 268) for writ of certiorari filed by the respondents herein they seek review of certain questions, only in the event that this Court grants the petition herein. Respondents submit that the petition herein presents neither a case nor questions of the character for certiorari jurisdiction. Petitioners' effort to show novelty and importance is based principally upon inaccurate statements of the record. These will be pointed out in the following discussion of the questions raised in the petition.

I.

The Question Respecting Going-Concern Value Is Not of the Character for Certiorari Jurisdiction.

A. The petition misstates the question. The real question involves no principle of law, but only a factual study of this particular record.

Petitioners' statement of the question (Pet. 2) and discussion (Pet. 9-12) on the issue of going-concern value correctly presents neither the question nor the record. Petitioners assert (Pet. 2, 9) that the question is whether a *separate* allowance *must* be made for going-concern value. Petitioners say (Pet. 9) that the Commission appraised the physical assets "as part of an assembled whole" (which is inaccurate) and that the court below required a separate allowance for going-concern value (which is inaccurate). The court below properly held, among other things, that the Commission did not value the property as a going concern but only as inert property, and that the Commission erred in allowing no going-concern value (R. Vol. VIII, p. 4039).

The true issue is whether the Commission's opinion and findings, in view of the record, show *any* allowance for going-concern value. Contrary to petitioners' assertion (Pet. 9), the court below did not hold that a separate allowance for going-concern value is necessary where that value is included in the appraisal of the property (See cases, Pet. 9). Petitioners do not raise or challenge the elementary proposition that going-concern value, where proved, is property which may not be taken without due process. *The petition does not specify for review any question as to respondents' proofs of going-concern value or the amount (not less than $8,500,000) which respondents claim and which the court below found proper* (R. Vol. VIII, p. 4039).

The true issue here involves no novel or important question of law. The decision below is not in conflict with decisions of this Court. It is not in conflict with decisions of other courts of appeals. The question involves only a factual study of this particular record. Petitioners' statement that the decision below on going-concern value is "a far-reaching departure from the principles heretofore established in other fields of utility regulation" (Pet. 12) is without basis. Petitioners refer to other cases pending under the Natural Gas Act and assert that "The Commission has assumed that, under the decisions of this Court, an appraisal of the property as 'part of an assembled whole' was sufficient" (Pet. 11). The decision below does not disturb the Commission's assumption. There is no ground for the exercise of certiorari jurisdiction. Petitioners importune this Court "to review evidence and discuss specific facts."[1]

B. The decision below on going-concern value is sound.

1. *The court below correctly decided that the Commission made no allowance for going-concern value.*

Petitioners' assertion (Pet. 9) that the Commission's valuation includes going-concern value is contrary to the record.

(a) The Commission *accepted* the testimony of respondents' witnesses as to reproduction cost new of the physical properties and as to the value of the gas reserves (R. Vol. VIII, p. 3936). *Petitioners do not mention the fact that respondents' witnesses as to the value of the physical properties did not place a value on the properties as a going concern* (R. Vol. II, pp. 1236, 1276; Vol. III, p. 1355). These witnesses testified as to the reproduction cost new of each item (R. Vol. II, pp. 1191-1276). They did not value the

1. *U. S. v. Johnson*, 268 U. S. 220; *Southern Power Co. v. N. C. Public Service Co.*, 263 U. S. 508.

properties as a going concern or "as part of a assembled whole" (R. Vol. II, pp. 1236, 1276; Vol. III, p. 1355). They did not include the intangible or going-concern value (R. Vol. II, pp. 1236, 1276; Vol. III, p. 1355).

(b) The Commission also *accepted* respondents' evidence as to capital additions from June 1, 1939, to December 31, 1942, and as to working capital (R. Vol. VIII, p. 3936-7). From the four items, (1) reproduction cost new of physical properties, (2) value of gas reserves, (3) capital additions, and (4) working capital, the Commission made up the rate base (R. Vol. VIII, p. 3937). *Not one of these items includes any going-concern value.*

(c) The Commission flatly rejected respondents' claim for going-concern value (R. Vol. VIII, pp. 3936-7).

(d) The Circuit Court of Appeals correctly interpreted the Commission's opinion in holding that the Commission made no allowance for going-concern value. The court said (R. Vol. VIII, p. 4039):

> "The Commission argues that in fixing the value of the rate base as high as $74,420,424, it gave full recognition to petitioners' business as a going business concern. This statement is contrary to the memorandum filed by the Commission with its findings. The $74,420,424 was made up of—
>
> | | |
> |---|---|
> | Reproduction Cost New of Physical Properties | $56,302,250 |
> | Value of Gas Reserves | 13,334,775 |
> | Capital Additions for the Period June 1, 1939 to December 31, 1942 | 3,808,399 |
> | Working Capital | 975,000 |
> | Total Rate Base | $74,420,424 |
>
> The total is the amount which the Commission adopted as its rate base. It does not include going value.
>
> Moreover, in its opinion, the Commission said, 'The Companies' claim of $8,500,000 for going concern value

must be disallowed. The amount obviously is an arbitrary claim, not supported by substantial evidence warranting its allowance. Its allowance would mean the acceptance of a deceptive fiction resulting in an unfair imposition upon consumers.'

In the face of this statement we must assume that the Commission did not allow any sum for going value."

(e) Petitioners assert (Pet. 9, footnote 5) that there is "ample evidence" that the Commission included going-concern value. Two items of "ample evidence" are stated (Pet. 9, footnote 5). The first is "the Commission's adoption, as its basis of valuation, of respondents' estimate of reproduction cost, which was $13,500,000 in excess of the original investment (R. 3937) and which included, in addition to labor and material costs, large allowances for overheads, such as interest, taxes, and administrative, legal, supervisory and 'preliminary operations' (R. 1224-1231, 1234)" (Pet. 9, footnote 5). Two answers to this are apparent. In the first place, the Commission *accepted* respondents' reproduction cost estimate as the fair value. That reproduction cost estimate does not include going-concern value. To point out that the fair value found by the Commission is more than the original investment does not show that the fair value found by the Commission includes going-concern value. To determine what the fair value as found by the Commission includes, it is necessary to consider what the Commission *did*. What the Commission did is clear. Furthermore, petitioners are not in a position to attack the finding of the Commission as to fair value. That this finding of the Commission is supported by substantial evidence is unchallenged. Under Sec. 19(b) of the Natural Gas Act (15 U. S. C. 717r-b) neither this Court nor the court below has power to set aside the Commission's finding and substitute its own finding.

Petitioners' reference to the fact that the Commission's

finding as to fair value of the inert physical property "included, in addition to labor and material costs, large allowances for overheads, such as interest, taxes, and administrative, legal, supervisory and 'preliminary operations'" is a misleading statement of the record. Petitioners' statement implies that these "overheads" are for the cost of attaching business to an inert property. This is not true. The "overheads" to which petitioners refer are *for the period of construction* (R. Vol. II, pp. 1224-31). These are construction costs. Respondents' claim of going-concern value is based upon proved costs of attaching business *after* the period of construction (R. Vol. II, p. 1278; Vol. III, p. 1329). These costs as proved were found proper by the court below (R. Vol. VIII, p. 4039), and are unchallenged here.

The second answer to petitioners' first item of "ample evidence" is that the difference of some $13,500,000 between the finding of the Commission as to fair value and the original investment does not establish that the Commission made a finding as to going-concern value *on evidence.* With respondents' evidence of going-concern value rejected by the Commission, there was no evidence in the record on which the Commission could have given consideration to going-concern value. The Commission did not have before it any evidence as to the value of the property as a going-concern or "as part of an assembled whole." If, as petitioners appear to suggest, the Commission took a middle figure between respondents' reproduction cost new estimate and original investment and then added something for going-concern value (which is not what the Commission did), the adding of something was not based on evidence, but on guess. Respondents are not in the position of a party attacking a rate order in a District Court; respondents did not and do not have the burden of proving their going-concern value. If petitioners'

suggestion were accurate as to fact, it is apparent that rates fixed on the basis of a guess as to the value of certain property are unreasonable.

Petitioners' second item of "ample evidence" (Pet. 9, footnote 5) is the Commission's statement that it allowed in the rate base "more than an adequate amount to cover all elements of value" (R. Vol. VIII, p. 3937). This is not a statement that going-concern value was included. Further, the statement manifestly does not overcome the uncontradicted fact that the Commission accepted respondents' reproduction cost estimate, which did not include going-concern value, and expressly rejected respondents' claim of going-concern value. Moreover, the statement does not overcome the lack of any evidence upon which the Commission could have fixed going-concern value, the Commission having rejected respondents' evidence.

2. *Petitioners do not challenge the decision below that a going-concern value of not less than* $8,500,000 *is proved.*

As stated above, the petition does not specify for review any question as to respondents' proofs of going-concern value or as to the value claimed by respondents (See Pet. 2). Both the proofs and the amount were upheld by the court below (R. Vol. VIII, p. 4039). However, attention is called to a serious misstatement of the record by petitioners in their discussion of going-concern value. Petitioners state (Pet. 9-10):

> "* * * the going-concern allowance approved by the court below was calculated on the basis of interest and return assumed to have been unearned in the past and other deficiencies in past earnings, previously included in operating expenses, during the period of business development (R. 1276-1282; 1327-1337; 2943-2947), a method which this Court has specifically condemned.

Galveston Elec. Co. v. *Galveston*, 258 U. S. 388, 393-397; *Columbus Gas & Fuel Co.* v. *Public Utilities Commission*, 292 U. S. 398, 411-413."

By this erroneous statement petitioners seek to bring this record within the rule laid down in the *Galveston case*, that the cost of developing an "*operating*" plant into "*a financially successful concern*"[2] is not allowable as going concern value. Respondents' evidence, however, is not based on such cost. The evidence is the actual cost of putting respondents' plant *into operation*. Respondents initially built their plant of sufficient capacity for the anticipated total market (R. Vol. II, pp. 680, 1279). It was impossible to develop the market the instant the pipeline was complete (R. Vol. II, p. 680). The development of the market took four years (1932-1936) and was expensive (R. Vol. II, pp. 676-7). It was impractical and uneconomic to lay small pipe for the initial market and lay larger pipe as the market was developed (R. Vol. II, pp. 680, 1279; Vol. III, p. 1328). The same was true of compressor stations and other facilities (R. Vol. II, pp. 680, 1279; Vol. III, p. 1328). During the four years required to put respondents' facilities into operation, respondents incurred actual costs on idle facilities in respect to (1) interest, (2) taxes, (3) depreciation, and (4) non-varying operating costs (R. Vol. II, pp. 1278-1282; Vol. III, pp. 1329-1337). In addition, respondents expended the sum of $1,567,372 in the four-year period for advertising and other promotional activities for development of the total market (R. Vol. II, p. 1281; Vol. III, p. 1329). This Court in the *Galveston case* clearly distinguished between "the cost of converting the inert railway plant into an operating system" and "the cost of developing the operating railway system into a financially

2. 258 U. S. 393.

successful concern'' (258 U. S. 393-4). This Court condemned the second cost, but not the first.[3]

That the decision below is sound and does not conflict with the decision in the *Galveston case* is shown by the decision of this Court in *Southwestern Bell Tel. Co.* v. *City of Fort Smith*, 294 Fed. 102, 104-6, affd. 270 U. S. 627. In that case this Court, in an unanimous opinion, approved a going-concern value reached upon the same basis as that presented here, and cited the *Galveston case* as authority. It is significant that petitioners do not mention this case.

It will be recalled that with respect to the "overheads, such as interest, taxes, and administrative, legal, supervisory, and 'preliminary operations,' " included in the Commission's reproduction cost appraisal, petitioners sought to imply that these items were for the period from completion of the facilities to full operation of facilities, whereas in fact these overheads were for the period of construction (Pet. 9, footnote 5). With respect to the costs based upon interest, taxes, depreciation, etc., on idle facilities included in respondents' evidence, petitioners seek to imply that these items were for the period *after* full operation, whereas in fact they were for the period from completion of facilities to full operation.

The failure of petitioners to raise any question as to respondents' proofs of going-concern value disposes of the issue. However, it is apparent that the issue involves

3. In *Columbus G. & F. Co.* v. *Public Utility Com.*, 292 U. S. 398, cited by petitioners (Pet. 10), the utility, attacking the rates in the District Court, failed to prove going-concern value such as proved here. This Court said (p. 412):

"No evidence was offered by the appellant that expenses had been incurred 'in overcoming initial difficulties incident to operation and *in securing patronage*.' *Galveston Electric Co.* v. *Galveston*, *supra*."

The Court also said (p. 413):

"'From the testimony as a whole one gains a definite impression that the opinions are derived for the most part from a professed experience and understanding of business conditions generally, and very little from any knowledge of the 'history and circumstances of the particular enterprise'."

only a review of the evidence and a discussion of the specific facts shown on this record. It is likewise apparent that the decision of the court below in respect to respondents' proofs is sound.

II.

The Question Respecting the Period of Amortization Is Not of the Character for Certiorari Jurisdiction.

The second question raised by petitioners is (Pet. 2):

> "Whether, in determining the annual allowance for amortization, the Commission may compute the allowance on the basis of the entire service life of the capital assets or only on the basis of the remaining life from the date of the passage of the Natural Gas Act of June 21, 1938, or from the date of the rate order."

The Circuit Court of Appeals sustained respondents' point or proposition on this question as follows:

> THE COMMISSION'S ORDER SHOULD BE SET ASIDE BECAUSE IT IS CONFISCATORY IN THAT THE COMMISSION PROVIDED FOR THE AMORTIZATION OF ONLY THE ORIGINAL COST OF THE PROPERTY AND FIXED THE AMORTIZATION PERIOD AT THE ENTIRE LIFE OF RESPONDENTS' BUSINESS, WHICH COMMENCED LONG PRIOR TO REGULATION.
>
> A. THE NECESSARY OPERATION AND EFFECT OF THE NATURAL GAS ACT, IF VALID, IS TO CONDEMN TO PUBLIC USE RESPONDENTS' PROPERTY UTILIZED IN THE CONDUCT OF THEIR BUSINESS, WHICH, PRIOR TO THE ENACTMENT OF THE ACT, WAS A STRICTLY PRIVATE ENTERPRISE.
>
> B. A VALID ADMINISTRATION OF THE NATURAL GAS ACT REQUIRES THAT RESPONDENTS BE COMPENSATED, BY A PROPER AMORTIZATION ALLOWANCE, FOR THE PRESENT FAIR VALUE OF THEIR PROPERTIES, INCLUDING GOING CONCERN VALUE, AS OF THE TIME THEY WERE CONDEMNED FOR PUBLIC USE.
>
> C. THE PROPER PERIOD OF AMORTIZATION IS THAT BEGINNING WITH REGULATION UNDER THE NATURAL GAS ACT AND ENDING WITH THE LIFE OF RESPONDENTS' ENTERPRISE.

Respondents commenced business on January 1, 1932 (R. Vol. I, p. 561). The Commission, for the purposes of the order, adopted the testimony of respondents' witnesses to the effect that the life of respondents' reserves would be exhausted by December 31, 1954 (R. Vol. VIII, p. 3938). The Commission fixed the period of amortization at 23 years, commencing January 1, 1932, and ending December 31, 1954, and fixed the amount to be amortized at $78,284,009, the original cost of all capital assets through the entire 23-year period, except the costs incurred in developing respondents' business, claimed as going-concern value, less salvage (R. Vol. VIII, p. 3938). Respondents contended that the proper amount to be amortized is the *present* value of respondents' property, including actual costs incurred in developing their business, or going-concern value, plus future capital additions necessary to continue their present volume of business, less salvage, *and that the period of amortization should begin with the date when respondents were first subjected to regulation*—on August 1, 1940, the date of the order, or, in any event, not earlier than June 21, 1938, when the Natural Gas Act was passed (R. Vol. VIII, p. 4015).

Respondents claimed as the proper amount to be amortized the sum of $84,341,218, made up of the following items (Exhibit 211, R. Vol. VII, p. 3902):

Reproduction cost new, excluding gas reserves	$56,302,250
Viewed depreciation (deduct)	2,866,758
Value of gas reserves	13,334,775
Cost of additional property	9,145,083
Going-concern value	8,500,000
Working capital	975,000
	$85,390,350
Less salvage	1,049,132
	$84,341,218

No issue is presented as to the figures making up the total claim. In fixing the rate base the Commission ac-

cepted respondents' figure of $56,302,250 as representing the reproduction cost new (R. Vol. VIII, p. 3936). The figures representing the viewed depreciation are established by the undisputed testimony of the witnesses who testified on that point (R. Vol. II, pp. 1286-1305). The value of the gas reserves in their depleted state was established by undisputed testimony (R. Vol. III, pp. 1350-1360) and was accepted by the Commission in fixing the rate base (R. Vol. VIII, p. 3937). The Commission also accepted the cost of additional property necessary to continue respondents' business through the remainder of the period ending December 31, 1954 (R. Vol. VIII, p. 3938), and the figures submitted by respondents as to necessary working capital (R. Vol. VIII, p. 3937). The figures representing the item of going-concern value were not disputed. The figures submitted by respondents' witnesses as to salvage value stand undisputed in the record (R. Vol. V, p. 3021). The questions presented, therefore, are not questions of fact or questions of economics, as petitioners contended in the court below, nor did the court in its decision "enter a debatable field of fact and choose and prescribe an invariable method of computation," as charged by petitioners in their application. They are strictly legal questions—indeed, questions of constitutional rights.

Petitioners ignore entirely the difference in the status of respondents prior to the enactment of the Natural Gas Act and the status of an ordinary distributing utility under regulation from the beginning of its operations, which voluntarily dedicated its property to public use upon entering business. The three cases cited in the footnote on page 13 of the petition had to do with such distributing utilities, which were under regulation from the beginning. An entirely different situation is presented when a purely private enterprise is put under regulation

by an act of Congress which operates to change the character and use of its property by requiring that it be utilized in the public interest.

Prior to the enactment of the Natural Gas Act respondents were engaged in a strictly private enterprise. They expended many millions of dollars in acquiring natural gas reserves in the State of Texas, developing those reserves, and constructing a pipeline and other facilities for transporting natural gas from these reserves to distant markets, where the gas was sold to selected customers under private contracts. At no time did respondents hold themselves out to sell gas to the general public. They invested their money in this enterprise on the theory that they would control their marketing policies, select and pass upon the credit of those to whom they would sell gas, and determine whether or not any prospective customer would be able to purchase a sufficient volume of gas to justify their building extensions required to deliver gas to such particular customer. In other words, they launched this enterprise and invested a large amount of money, representing the cost of their reserves and facilities, in a business which they expected and intended to operate in their own interests, just as any private business is operated in the interest of those who establish and own it.

The effect of the Natural Gas Act is to change entirely the character of respondents' ownership and use of their property. They are not given the choice of dedicating their property to the public interest or discontinuing their business. They are no longer a private enterprise. Their property is no longer subject to use in the private interests of the owners but must now be devoted to the public interest. They are no longer the sole judges of the credit and the accessibility of any utility applying for service. They cannot discontinue the sale and delivery of natural gas to any utility whose business turns out to be unprofit-

able or for any other reason undesirable. They must continue in business and sell natural gas to any utility to which the Commission shall direct them to sell. By legislative fiat they have been changed from a strictly private enterprise, owning and operating property for their own private purposes and in their own interest, to custodians of property which they must operate, whether they like it or not, for the benefit of the public under the direction of the Commission.

This is condemnation. The courts have frequently pointed out the analogy between condemnation proceedings in the exercise of the right of eminent domain and in the rate making process.[4]

It was not the money expended by respondents in 1930 and 1931 in acquiring gas reserves and constructing their pipelines, compressor stations and other facilities, or that spent for additional capital facilities from year to year up to the enactment of the Natural Gas Act, which the Act operates to condemn. That money was expended and was beyond the reach of Congress, the Commission, or respondents. It was *the property which respondents owned and used* in connection with the conduct of their business which Congress required respondents to subject and devote to the public interest. "It is that property and not the cost of it that is protected by the Fifth Amendment. * * * It is settled by the decisions * * * that just compensation is the value of the property taken at the time of taking." *Brooks-Scanlon Corp.* v. *U. S.*, 265 U. S. 106, 123, 68 L. Ed. 934, 941.

Past earnings or losses, methods of bookkeeping, book

4. *San Diego Land & Town Co.* v. *National City*, 74 Fed. 79, 84.
Spring Valley Waterworks v. *San Francisco*, 124 Fed. 574, 594-5.
Monongahela Navigation Co. v. *U. S.*, 148 U. S. 312, 37 L. Ed. 463.
West v. *Chesapeake, etc., Co.*, 295 U. S. 662, 671, 79 L. Ed. 1640, 1646-7.
Vogelstein & Co. v. *U. S.*, 262 U. S. 337, 340, 67 L. Ed. 1012, 1014.
U. S. v. *New River Collieries Co.*, 262 U. S. 341, 344, 67 L. Ed. 1014, 1017.

entries for depreciation or depletion, failure to make provision in the accounts for amortization, all are immaterial. It is utterly immaterial what the properties cost respondents or how much of that cost has been returned to them in earnings over the period during which they operated as a private enterprise. The property which they owned and used in their business at the time the Natural Gas Act became effective was their property and the then value of that property belonged to them. They cannot be deprived of that property or its use without the compensation guaranteed to them under the operation of the due process clause of the Fifth Amendment; nor can they be required to apply as a credit on that value any part of their earnings or revenue prior to the enactment of the Natural Gas Act.

Congress can condemn respondents' property only by a procedure consistent and comportable with due process of law under the Fifth Amendment. Due process requires, as an absolute condition to a valid condemnation of their property to public use, that respondents be allowed to earn a reasonable return on the value of their property during the time it shall be subjected to public use and that they be allowed to set aside out of the earnings over the same period an amount which, together with the salvage value of the property, at the end of the period will return to them the value of their property at the time of condemnation. In the case of a continuing utility of indefinite life, the return of the value is secured by an adequate allowance for depreciation, sufficient in amount to replace the facilities as and when they become worn out or obsolete. In the case of an extractive industry like that of respondents, the life of which is limited by a diminishing source of supply, the return of the value of the property is secured by a proper allowance for amortization which together with the salvage value will return to them that value as of the time their business termi-

nates. The application of the principle in the fixing of the so-called rate base and in the allowance for depreciation or amortization is clearly and emphatically stated by the Supreme Court in *United R. & E. Co. v. West*, 280 U. S. 234, 253-4, 74 L. Ed. 390, 410-11. Petitioners cite no decision of this Court to the contrary, but content themselves with the observation that, so far as that case is deemed to support the decision of the court below, "it can no longer be regarded as controlling."

The same constitutional principle invoked to support respondents' claim that in fixing the amount to be amortized the Commission must consider the value of the property as of the time it is first condemned to public use under the Natural Gas Act, and not the original cost of that property eight or ten years previously, supports with equal emphasis respondents' claim that the compensation for that fair value or return to respondents of that fair value must be paid out of earnings subsequent to the time of condemnation. Otherwise, the full amount representing the value is not returned, but only the portion thereof represented by the original cost less the accruals over the several years prior to regulation. Only 15 years, approximately, of the field's life remained at the time regulation began. If the Commission could distribute the amortization over the entire 23 years' life of the field, it follows that only 15/23 of the proper amount to be amortized would be returned to respondents. They are not entitled merely to 15/23 of that amount, but to *all* of that amount plus the additional amounts representing future capital outlays necessary to the continuance of their business.

The Commission cannot impose regulation retroactively by going back to the beginning of 1932 and deducting from the proper amount to be amortized, which includes the present value of respondents' properties, an amortization

allowance plus interest thereon, compounded annually at 6½%, the rate of return allowed, over eight or nine years prior to the time they were subjected to regulation under the Natural Gas Act. Whether respondents made too much or too little prior to regulation is utterly beside the issue. Whether their earnings were paid out as dividends or applied to retirement of the capital is of absolutely no import; for, as we have already pointed out, the property which was condemned under the Natural Gas Act was respondents' property, and the value of that property must be returned to respondents under regulation and not prior to regulation. No other holding but that of the court below can be reconciled with the due process clause of the Fifth Amendment, as that court aptly pointed out in its opinion.

On page 13 petitioners assert that the decision of the court below requires a method of determining amortization or depreciation which is in conflict with the prevailing practice of the industry and of the regulatory bodies. We have already pointed out that the three cases cited by petitioners involve distributing utilities under regulation from the beginning of their operations. We have found only two cases in which the status of the regulated concern had formerly been that of an unregulated private enterprise. In each of these cases the regulatory body and the trial court adopted the principle for which respondents are here contending; and both these cases were affirmed by this Court. In one of these cases the company commenced business in 1903. It purchased many additional properties in 1909. But the Railroad Commission of Kentucky fixed the beginning of the period of amortization as 1910, the year in which the company voluntarily dedicated its properties to public use by entering upon the distribution of gas to the public under franchises as a public utility. *United Fuel Gas Co.* v. *Railroad Commission*, 13 Fed. (2) 510, 526; affirmed in *United Fuel*

Gas Co. v. *Railroad Commission*, 278 U. S. 300. In the other case the Public Service Commission of West Virginia fixed as the beginning of the amortization period, not the date when the company dedicated its properties to the public interest, but the date of the first rate order. *In re United Fuel Gas Co.* (W. Va.), Case 1516, P. U. R. 1925 B, 705; *United Fuel Gas Co.* v. *Public Service Commission*, 14 Fed. (2) 209, 225; affirmed in 278 U. S. 322.

Conclusion.

For the reasons pointed out, respondents respectfully submit that the Circuit Court of Appeals reached the correct judgment in vacating and setting aside the Commission's order, and that the petition for writ of certiorari should be denied.

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